APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 92-3709

International Woodworkers of America, U.S. AFL-CIO, and Its Local 5-15,
Plaintiffs - Appellees,

v.

Weyerhaeuser Company,
Defendant - Appellant.

Appeal from the United States District Court
for the Western District of Arkansas.

Submitted: June 18, 1993

Filed: October 12, 1993

Before WOLLMAN and LOKEN, Circuit Judges, and HUNTER,* Senior District Judge.

LOKEN, Circuit Judge.

Weyerhaeuser Company ("Weyerhaeuser") appeals a district court order enforcing an arbitration award issued in favor of the International Woodworkers of America and its Local 5-15 (collectively, the "Union"). We vacate the award because it did not draw its essence from the collective bargaining agreement.

I.

The arbitration at issue arose under the single collective bargaining agreement between Weyerhaeuser and Local 5-15

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*The HONORABLE ELMO B. HUNTER, Senior United States District Judge for the Western District of Missouri, sitting by designation.

covering various Weyerhaeuser facilities in Arkansas and Oklahoma (the "Agreement"). For over twenty years, Weyerhaeuser paid certain maintenance workers covered by this Agreement for their one half-hour lunch breaks because they were expected to work during lunch as the need arose. Since these employees otherwise worked an eight hour schedule, this policy assured them one half-hour of overtime pay on most work days.

On March 28, 1989, Weyerhaeuser instituted a new policy — or work schedule change, as the Company called it — giving these maintenance employees unpaid half-hour lunch breaks during which they could leave the company premises and were not expected to work. Various employees filed grievances, contending that this unilateral change in past practice was a breach of the collective bargaining agreement. Weyerhaeuser denied the grievances, and the parties proceeded to arbitration under Article VII of the Agreement providing that, "The Arbitrator shall have no power to add to or subtract from or modify any of the terms of this Agreement."

Before the arbitrator, the Union submitted evidence that the practice of paid lunch breaks had continued over the course of numerous prior agreements. Relying upon the favorable decision of another arbitrator on a similar issue, the Union argued that the practice had become an economic benefit under the Agreement and therefore Weyerhaeuser's unilateral termination of that benefit violated its duty under Article I of the Agreement "to negotiate with the changes in employee benefits that it wishes to make." Weyerhaeuser responded that its action was consistent with its prerogatives under the "Management's Rights" provisions in the Agreement and that the prior award was clearly wrong and, in any event, was not binding in this arbitration.

The arbitrator decided in favor of the Union, awarding affected employees back pay for their unpaid lunch periods from March 28, 1989, without interest. Ignoring the arguments made by the parties, the arbitrator based his decision upon Article XI,

Section I, of the Agreement, which provides:

> Time and one-half shall be paid for the following:
>
> 1) For all time worked in excess of forty (40) hours in any one week.
>
> 2) For all hours worked on the holidays specified in this Agreement in addition to holiday pay if so entitled.
>
> 3) For all time worked during the twenty-four (24) hour period on Sunday.
>
> 4) For all time in excess of eight (8) hours in any one day.

The arbitrator reasoned that the presence of the word "worked" in the first three clauses of Section I and its absence from clause 4 was dispositive. Invoking the principle that all words in a contract must have meaning, the arbitrator concluded:

> [I]n this one overtime provision alone [clause 4], the hours in excess of 8 in one day are not hours that are required to be worked. Rather, any time in excess of 8 hours in one day, that the employee is required to be at the Employer's place of business, qualifies the employee for overtime pay.

Therefore, "Section I of Article XI expressly provides for overtime pay for those employees who have 'time' at the plant, at the request of the Company, in excess of 8 hours in any one day," and Weyerhaeuser must continue to pay overtime for the scheduled lunch breaks regardless of whether work is required.

Weyerhaeuser petitioned to reopen the proceedings. Noting that neither party had suggested that Article XI, Section I(4), provided a basis for resolving the dispute, Weyerhaeuser stated that it could offer "irrefutable proof" that omission of the word "worked" from that provision was a clerical error in the original 1973 collective bargaining agreement and that both parties had consistently interpreted the provision as referring only to time

worked. The arbitrator refused to reopen, stating that his issuance of the award rendered him *functus officio*.[1]

The Union commenced this action seeking enforcement of the award, and Weyerhaeuser urged the district court to vacate. The district court granted summary judgment in favor of the Union, concluding that, "An arbitrator's decision, drawn from the unambiguous, and internally consistent language of a contract must receive great respect by a trial court." On appeal, Weyerhaeuser argues that the arbitrator went beyond his contractual authority, and failed to draw his award from the Agreement, when he relied upon an ambiguous provision not addressed by the parties.

II.

We agree with the district court that the scope of judicial review of arbitration awards under collective bargaining agreements is extremely limited:

> The courts are not authorized to reconsider the merits of an award even though the parties may allege that the award rests on error of fact or on misinterpretation of the contract. . . . As long as the arbitrator's award "draws its essence from the collective bargaining agreement," and is not merely "his own brand of industrial justice," the award is legitimate.

United Paperworkers Int'l Union v. Misco, Inc., 484 U.S. 29, 36 (1987), quoting *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960). Thus, we must

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[1] Under the doctrine of *functus officio*, "once an arbitrator has made and published a final award his authority is exhausted, and he . . . can do nothing more in regard to the subject matter of the arbitration." *La Valle Plaza, Inc. v. R.S. Noonan, Inc.*, 378 F.2d 569, 572 (3d Cir. 1967). *See Domino Group, Inc. v. Charlie Parker Memorial Found.*, 985 F.2d 417, 420-21 (8th Cir. 1993).

determine whether the arbitrator's award in this case "draws its essence from the collective bargaining agreement."

The "essence" of a collective bargaining agreement cannot always be divined by the same process that a court uses in construing a more typical commercial contract. As the Supreme Court explained in its landmark *Steelworkers Trilogy*, "The collective agreement covers the whole employment relationship. It calls into being a new common law — the common law of a particular industry or of a particular plant." *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 579 (1960). Therefore, "The labor arbitrator's source of law is not confined to the express provisions of the contract, as the industrial common law — the practices of the industry and the shop — is equally a part of the collective bargaining agreement although not expressed in it." *Id.* at 581-82.

In this case, the arbitrator based his award on Article XI, Section I(4), of the Agreement. In interpreting this provision, the arbitrator employed a purely textual analysis, relying on the absence of the word "worked" in Section I(4), its presence in Sections I(1)-(3), and the principle that each word in a contract must be given meaning. Had the parties submitted evidence and conflicting argument as to the proper construction of this provision, we would be required to enforce this interpretation. In labor arbitration, "It is the arbitrator's construction which was bargained for." *Enterprise Wheel*, 363 U.S. at 599. Therefore, "an [arbitrator's] interpretation of the literal language of the disputed provision . . . obviously draws its essence from the collective bargaining agreement." *United Food & Commercial Workers, Local No. 222 v. Iowa Beef Processors, Inc.*, 683 F.2d 283, 285 (8th Cir.), *cert. denied*, 459 U.S. 1088 (1982).

But in this case the parties did not address Article XI, Section I(4), in the evidence and argument they submitted to the arbitrator. By their silence, the parties represented to the arbitrator that

this provision did not afford a basis for resolving this dispute. More significantly, the absence of evidence on the question deprived the arbitrator of the "industrial common law" surrounding this part of the Agreement — its negotiating history, relevant past practices of the industry and shop, and other extrinsic indicia of the parties' intent.

Weyerhaeuser argues that the arbitrator exceeded his authority by basing his award on a provision of the Agreement not addressed by the parties. But we held to the contrary in *Lackawanna Leather Co. v. United Food & Commercial Workers Int'l Union*, 706 F.2d 228, 230-32 (8th Cir. 1983) (en banc), where we upheld an award that was based upon the arbitrator's "normal interpretation" of a provision "common in collective bargaining agreements." *Lackawanna* thus establishes that the arbitrator acted within his authority in considering the entire Agreement before deciding the grievance submitted to him. The question remains, however, whether his award drew its essence from that Agreement.

We have repeatedly applied the Supreme Court's teaching that labor arbitrators must consider the parties' past practices and "the common law of the shop" in interpreting collective bargaining agreements. In *Trailways Lines, Inc. v. Trailways. Inc. Joint Council*, 807 F.2d 1416, 1423 (8th Cir. 1986), we affirmed the vacating of an award because the arbitrator had ignored the "law of the shop," had failed to discuss a relevant contract provision, and had simply copied from his decision in a previous case. In *International Union UAW v. White Motor Corp.*, 505 F.2d 1193, 1198-99 (8th Cir. 1974), *cert. denied*, 421 U.S. 921 (1975), we enforced an award because the arbitrator had properly considered the parties' bargaining history and prior agreements in concluding that the absence of an attachment to the collective bargaining agreement was an inadvertent omission. *See also Fairview Southdale Hosp. v. Minnesota Nurses Ass'n*, 943 F.2d 809 (8th Cir. 1991) (arbitrator properly relied upon past conduct in construing ambiguous provision).

If Article XI, Section I(4), was an "unambiguous, and internally consistent" provision, as the district court concluded, we would not fault the arbitrator for applying its plain meaning to the grievance before him. But we cannot agree that this provision is unambiguous. Standing alone, Article XI, Section I(4), reads, "Time and one-half shall be paid for . . . all time in excess of eight (8) hours in any one day." There is some ambiguity in that language, but its "normal interpretation" (to borrow the key phrase in *Lackawanna*) would surely be that it is limited to "time worked"; in other words, the word "worked" would be read into the provision, *the opposite of the arbitrator's construction in this case*. When Section I(4) is compared to Sections I(1)-(3), which contain the word "worked," the significance of the omission of that word in Section I(4) becomes far more problematic. As the arbitrator implicitly recognized by invoking the all-words-must-have-meaning canon of construction, Section I(4) becomes materially ambiguous.

Under the *Steelworkers Trilogy*, such ambiguity may only be properly resolved by considering the parties' bargaining history and past practices — the "industrial common law [that] is equally a part of the bargaining agreement although not expressed in it." *Warrior & Gulf*, 363 U.S. at 581-82. Thus, when the arbitrator construed this ambiguous provision without seeking the parties' guidance as to its intent and without evidence of their relevant past practices, he acted without considering the entire agreement. In these circumstances, we do not simply disagree with his interpretation of the Agreement; we conclude that he dispensed "his own brand of industrial justice," and his award cannot be said to "draw its essence from the collective bargaining agreement."

Accordingly, without deciding the merits of the underlying grievance, we vacate the arbitrator's award. The judgment of the district court is reversed and the case is remanded with instructions to remand to the arbitrator for such further proceedings as

the collective bargaining agreement may permit. *See Misco*, 484 U.S. at 40 n.10.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
HOT SPRINGS DIVISION

Civil No. 91-6127

INTERNATIONAL WOODWORKERS OF AMERICA, U.S., AFL-CIO, and its LOCAL NO. 5-15,
Plaintiffs,

vs.

WEYERHAEUSER COMPANY,
Defendant.

MEMORANDUM AND ORDER

Both parties to this action have moved for summary judgment pursuant to Rule 56. F.R.C.P.

The matter before this court arises out of a decision by Arbitrator Barnett M. Goldstein, which awarded to the plaintiffs, members of the International Woodworkers of America, payment for scheduled 30 minute lunch breaks, at the hourly wage rate. The award was based upon the arbitrator's application of the "plain language" of the collective bargaining agreement effective March 1, 1988 through March 1, 1991.

The plaintiffs sued in the United States District Court for the Western District of Arkansas to enforce the arbitration award.

The court is faced with the problem of determining whether a claimed error in printing a contract can be resolved by an arbitrator. The role of the court is very limited when reviewing an arbitrator's decision.

> It is confined to ascertaining whether the party seeking arbitration is making a claim which on its face is governed

> by the contract. Whether the moving party is right or wrong is a question of contract interpretation for the arbitrator. In these circumstances the moving party should not be deprived of the arbitrator's judgment, when it was his judgment and all that it connotes that was bargained for.

United Paperworkers International Union v. Misco, Inc., 484 U.S. 29, 37 (1987) (quoting *Steelworkers v American Mfg. Co.*, 363 U.S. 564, 567-68 (1960)).

The Supreme Court went on to explain that

> an arbitrator must find facts and a court may not reject those findings simply because it disagrees with them. The same is true of the arbitrator's interpretation of the contract. The arbitrator may not ignore the plain language of the contract; but the parties having *authorized the arbitrator to give meaning to the language of the agreement, a court should not reject an award on the ground that the arbitrator misread the contract.*

United Paperworkers International Union, 484 U.S. at 38 (emphasis added).

Statements of uncontroverted facts were filed by the parties pursuant to local rule No. 29 (Docket items 16 & 22). The statements of material uncontroverted facts are of little value in resolution of the motions for summary judgment except that they demonstrate that the parties are in complete disagreement as to what facts are material. But this much can be gleaned from the Rule 29 filings and the arguments of counsel:

1) The collective bargaining agreement in effect at the time the dispute arose covers the period from March 1, 1988 through March 1, 1991.

2) It contains the following provision.

Section I of Article XI:

Time and one-half shall be paid for the following:

1) For all time worked in excess of forty (40) hours in any one (1) week.

2) For all hours worked on the holidays specified in this Agreement, in addition to holiday pay if so entitled.

3) For all time worked during the twenty-four (24) hour period on Sunday.

4) For all time in excess of eight (8) hours in any one day.

Labor Agreement at 29-30.

3) For some time prior to March 28, 1989, certain of the Maintenance employees who work at the various plants in Wright City, had observed a practice of eating their lunch while they were working, or when they could, depending upon their work load, and were paid for the time period as observed by these employees as a "lunch period." Over a more than 20-year period, this practice seems to have been changed by the Company at various times, and was not a practice that was made available to all the Maintenance employees at all times.

On March 28, 1989, the Company sent a Memorandum to all Maintenance employees at Wright City, and to their Supervisors, notifying them that all maintenance employees thereafter, "will have a scheduled non-paid lunch break. The supervisors in these areas will schedule each individual's lunch period. This is a scheduled lunch period and employees may eat lunch on or off the premises."

(Goldstein Award at 2).

4) The company relies on Article II Management Rights Section II. "The Company specifically reserves the right to, in

accordance with its judgment . . . make or change rules, policies and practices *not in conflict with the provisions of this agreement.*" (Labor Agreement at Art. II Sect. II).

5) The company also asserts that Article XI Section I, (4) contains an error in that Section I-(4) should have read: "for all time *worked* in excess of 8 hours in any one day." and that an error is self evident when (4) is compared to (3), (2), and (1) which precedes it in Article XI.

But this language has continued for many previous contracts, and while it differs with items 3, 2, and 1, it is consistent with the elemental concept that an 8 hour day of controlled time is not the same as 8 1/2 hours of controlled time. (A 30 minute lunch break, which allows an employee to leave the premises, will hardly let him go far.)

The arbitrator carefully emphasized that management's prerogative to make and change policies and practices does not include a prerogative to violate the clear, unambiguous language of the agreement. Finally the arbitrator pointed out that he was bound to apply all the words in the labor agreement, and accordingly found that:

> It is obvious to this arbitrator that the change made by the Company on March 28, 1989, was in direct contravention of, and conflict with, the express provisions of the Agreement. The employees who worked, and/or who were at the Employer's place of business, and ready, willing and able to work, were not being paid in accordance with the overtime provisions of the Agreement (over 8 hours in a day).
>
> The Company contends that there is nothing in the Labor Agreement, either express or implied, "concerning a paid lunch period." I cannot agree. Section I of Article XI expressly provides for overtime pay for those employees

> who have "time" at the plant, at the request of the Company, in excess of 8 hours in any one day. Those employees are not being paid in accordance with the express terms of the Agreement.

(Goldstein Award at 8).

Decision:

An arbitrator's decision, drawn from the unambiguous, and internally consistent language of a contract must receive great respect by a trial court. As stated in *United Steel Workers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 599 (1959), ". . . the question of interpretation of the collective bargaining agreement is a question for the arbitrator. It is the arbitrator's construction which was bargained for; and so far as the arbitrator's decision concerns construction of the contract, the Courts have no business overruling him because their interpretation of the contract is different from his."

Motion for summary judgment in favor of the defendant, Weyerhaeuser Company, is denied.

Motion for summary judgment in favor of the plaintiffs, International Woodworkers of America, U.S., AFL-CIO, and its Local No. 5-15, is granted.

Let judgment be entered accordingly.

Dated this 28 day of September, 1992.

/s/ Bruce M. Van Sickle
Bruce M. Van Sickle, Judge
United States District Court

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
HOT SPRINGS DIVISION

Civil No. 91-6127

INTERNATIONAL WOODWORKERS OF AMERICA, U.S., AFL-CIO, and its LOCAL NO. 5-15,
Plaintiffs,

vs.

WEYERHAEUSER COMPANY,
Defendant.

ORDER

After reviewing the Defendant's Motion to set aside the Amended Judgment and reconsider Defendant's Motion for Summary Judgment and supporting brief, briefs of both parties for Cross-Motions for Summary Judgment and the record, the court is convinced that no error was committed. We note that no response has been filed under Rule 29(b) of the Arkansas Local Rules of Court. Therefore, we conclude that Plaintiff opposes neither the Motion to Reconsider the Amended Judgment nor the Motion to Reconsider the Summary Judgment.

THEREFORE,

IT IS ORDERED:

That Defendant's Motion to reconsider its Amended Judgment and reconsider Defendant's Motion for Summary Judgment is granted; and

That after having reconsidered Defendant's Motion, the court finds no error; therefore Defendant's Motion for Summary Judgment is denied and the Amended Judgment stands.

Dated this 28 day of October, 1992.

/s/ Bruce M. Van Sickle
Bruce M. Van Sickle, Judge
United States District Court

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
HOT SPRINGS DIVISION

Civil No. 91-6127

INTERNATIONAL WOODWORKERS OF AMERICA, U.S., AFL-CIO, and its LOCAL NO. 5-15,
Plaintiffs,

vs.

WEYERHAEUSER COMPANY,
Defendant.

REPORT AND RECOMMENDATION

The plaintiffs, International Woodworkers of America, U. S., et al (IWA) filed their Complaint herein on October 25, 1991, seeking enforcement of two arbitration awards and related relief. The defendant, Weyerhaeuser Company, filed its Counterclaim on December 9, 1991 asking the court to vacate and reverse the arbitration award and for related relief. Cross Motions for Summary Judgment are before the court. The parties have agreed that they should engage in further review of the award issued by Arbitrator Giles and this Court need not address the parties' Motions for Summary Judgment with respect to that award.

The award issued by Arbitrator Goodstein involved defendant Weyerhaeuser's decision to change the work schedule of certain of its employees and to cease to pay for time used for lunch periods. The arbitrator found for IWA and directed Weyerhaeuser to pay the affected employees their back pay for all time in excess of 8 hours in any day that each was scheduled to work.

Plaintiffs' Motion is based on the theory that the arbitration award is final, binding and nonreviewable by this Court except

in limited circumstances and, therefore, there is nothing for this Court to decide. The role of the courts in reviewing arbitration awards is extremely limited as is amply illustrated by plaintiff IWA's brief in support of its Motion. *See International Brotherhood of Electrical Workers Local 53 vs. Sho-me Power Corp.*, 715 F.2d 1322 (8th Cir. 1983). *See also W.R. Grace and Company vs. Local Union 759. International Union of the Rubber Workers of America*, 461 U.S. 757 (1983). *But see United Steel Workers of America v. Wheel and Car Company.* 363 U.S. 593, 597 (1960).

Weyerhaeuser's Counterclaim is based on the alleged facts that the word "worked" was intended to be included in Article XI, Section I (4) of the parties collective bargaining agreement but was omitted by a ministerial error.

A party is entitled to summary judgment where the documentary evidence produced by the parties permits only one conclusion. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251 (1986). On a motion for summary judgment, this court must determine if a fair minded jury could return a verdict for the nonmoving party. *Id.* at 252. The party seeking summary judgment must show that no genuine issue of material fact exists and that he is entitled to judgment as a matter of law by "pointing out" to the court that there is an absence of evidence to support the nonmoving party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986).

[paragraph deleted because it merely repeated immediately preceding paragraph]

The party opposing summary judgment must designate specific facts establishing a genuine issue for trial. *Matsushita Elec. Industrial Co. v. Zenith Radio*, 475 U.S. 574, 586 (1986). If the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial. *Matsushita*, 475 U.S. at 587. However, all inferences drawn from the underlying facts must be viewed in the light most favorable to the party opposing the motion. *Id.*

The court must uphold the arbitrator's award so long as it draws its essence from the collective bargaining agreement. *International Brotherhood of Electrical Workers, Local Union No. 53, AFL-CIO, supra.* The arbitrator may not disregard unambiguous contract provisions. *Inter-City Gas Corp. v. Boise Cascade Corp.*, 845 F.2d 184, 187 (8th Cir. 1988). The arbitrator may not ignore the plain language of the contract. *United Paperworkers International Union v. Misco Inc.*, 484 U.S. 29, 38 (1987). It is not our purpose here to address whether the contract provisions are ambiguous or the meaning of the plain language of the parties' contract. Rather, we must decide if there are material facts in dispute. The exact wording of a critical part of the contract is a material factual issue.

The parties intention and the nature of the alleged omission of the word "worked" are material facts in dispute. Furthermore, the parties' Motions and supporting documents indicate disagreement over whether omission of the word "worked" has been recognized and acknowledged as an a ministerial error by the parties' performance of the contract since 1973. The Court will ultimately have to determine whether the limited circumstances under which it can review the arbitration award exist in this case. Since there are material facts in dispute which must be determined before the court can reach that point, the parties' Motions for Summary Judgment should be denied.

The parties may file specific written objections to these findings and recommendations and must provide the factual or legal basis for each objection. An original and one copy of the objections must be filed with the Clerk of Court, P. O. Box I, Hot Springs, AR 71902 within 10 days. A copy must be served on the opposing parties.

The District Judge, even in the absence of objections, may reject these findings and recommendations in whole or in part.

Dated this 28th day of August, 1992.

/s/ Charles G. Vaccaro
CHARLES G. VACCARO
U. S. Magistrate Judge

APPENDIX E

IN THE MATTER OF ARBITRATION BETWEEN

WEYERHAEUSER COMPANY
(MID-SOUTH WOOD PRODUCTS)

AND

INTERNATIONAL WOODWORKERS OF AMERICA,
AFL-CIO, LOCAL 5-15

FMCS #91-03643

GRIEVANCES: #89-WCPM-38
#89-WCMT-29, 30, 31 & 34

GRIEVANTS: MAINTENANCE EMPLOYEES (PINE MERCHER, HARDWOOD MERCHER, HARDWOOD SAWMILL, PINE LUMBER & PLYWOOD)

HEARING HELD ON MAY 16, 1991, AT THE PALACE RESTAURANT, DE QUEEN, ARKANSAS, WITH NEAL SULLINS, SENIOR ATTORNEY FOR THE COMPANY, REPRESENTING THE COMPANY; RANDALL RICE, VICE-PRESIDENT OF THE INTERNATIONAL UNION, REPRESENTING THE LOCAL UNION; THE LOCAL UNION REPRESENTING ALL THE GRIEVANTS COVERED BY THE GRIEVANCES COMBINED FOR THIS HEARING, BEFORE BARNETT M. GOODSTEIN, IMPARTIAL ARBITRATOR, SELECTED THROUGH THE PROCEDURES OF THE FMCS, WASHINGTON, D.C.

BACKGROUND

The Company operates a large manufacturing complex at Wright City, Oklahoma, and has other facilities at locations in Arkansas. All of these operations are combined for purposes of collective bargaining, and there is one Agreement between the Company and Local 5-15 of the IWA covering all the locations

at Arkansas and Oklahoma. These Grievances, all combined and heard as one Grievance herein, cover Maintenance Employees who work at the Pine Mercher, Hardwood Mercher, Hardwood Sawmill, Pine Lumber & Plywood Plants within the Company's manufacturing complex.

The various plants at Wright City, Oklahoma process logs for manufacture; and the conversion of logs into pine lumber, hardwood lumber, and pine plywood. Certain of the Maintenance Employees work in one department only; however, those in the "Maintenance and Electrical" Department, and those in the "Filing and Grinding" Department provide maintenance services throughout the entire complex, servicing all departments.

For some time prior to March 28, 1989, certain of the Maintenance employees who work at the various plants in Wright City, had observed a practice of eating their lunch while they were working, or when they could, depending upon their work load, and were paid for the time period as observed by these employees as a "lunch period." Over a more than 20-year period, this practice seems to have been changed by the Company at various times, and was not a practice that was made available to all the Maintenance employees at all times.

On March 28, 1989, the Company sent a Memorandum to all Maintenance employees at Wright City, and to their Supervisors, notifying them that all maintenance employees thereafter, "will have a scheduled non-paid lunch break. The supervisors in these areas will schedule each individual's lunch period. This is a scheduled lunch period and employees may eat lunch on or off the premises."

As a result of this Memorandum to the maintenance employees, various groups of such employees filed Grievances over this unilateral change in their previous paid lunch period, on March 28, March 30, April 6 and April 19, 1989, all requesting that the Company not reschedule their lunch periods for the sole purpose

of avoiding the payment of overtime pay to these employees, in violation of the Collective Bargaining Agreement, and that they be paid back pay for all the unpaid lunch periods since the March 28 Memorandum. The Company responded in each case that, "Scheduled non-work lunch periods is not a violation of the labor agreement," and denied all the Grievances. They were processed through the Grievance Procedure to arbitration.

ISSUE

DID THE COMPANY VIOLATE THE COLLECTIVE BARGAINING AGREEMENT ON AND AFTER MARCH 28, 1989, WHEN IT CEASED PAYING LUNCH PERIODS FOR THOSE MAINTENANCE EMPLOYEES WHO HAD BEEN RECEIVING SUCH PAYMENTS PRIOR TO THAT DATE? IF SO, WHAT SHALL BE THE APPROPRIATE REMEDY THEREFORE?

OPINION OF THE ARBITRATOR

The Union contends that the Company had established a past practice of paying its Maintenance and Electrical employees at its Wright City, Oklahoma plants, a 30-minute lunch break. When the Company stopped this practice, unilaterally, and without negotiation with the Union, it violated the Collective Bargaining Agreement. The Union's arguments are based on the fact that Article I of the Agreement (Recognition) places upon the Company "the obligation to negotiate with the Union any changes in employer benefits that it wishes to make."

The Union contends that paid lunch breaks are a benefit to the employees, and once having been given to the employees, cannot be then unilaterally taken away from those employees. The Union argues that, since the practice continued, with only short interruptions for certain maintenance employees, for over 20 years, and many Labor Agreements were negotiated during that period, with no change having been negotiated in any of

those Agreements concerning the paid lunch periods, that economic benefit now has become a part of the Labor Agreement. Therefore, it can be changed only by negotiation between the Company and the Union, and cannot be unilaterally changed by the Company, as it did on March 28, 1989.

The Company responds to this Union argument by contending that the Company has the contractual authority to change custom and past practice. The Company argues that the Contract is "clear and unambiguous," and that it specifically gives to the Company the right to change current practices and not to be bound by past practices. The Company contends that, since there is no "maintenance of standards" clause in the Labor Agreement, and since the Management Rights Clause gives the Company the express right to change past practices, it is not bound by the past practice of paid lunch periods.

The Company cites Section II of Article II (Management's Rights) to prove its point. This Section, as quoted by the Company, reads as follows: "The Company specifically reserves the right to, in accordance with its judgment . . . make or change rules, policies and practices *not in conflict with the provisions of this agreement.*" (emphasis added by the arbitrator)

Thus, both parties appear to agree that there was a past practice by the Company of paying certain Maintenance employees for a lunch period during their respective shifts. Moreover, the Company defends its right to have paid lunch periods for many years, and then unilaterally change that practice, by the provisions of Section III of Article II of the Agreement. That Section provides, in pertinent part, that the Company does not waive its right to exercise any function reserved to it by not exercising that function for any particular period of time, "or preclude the Company from exercising the same in some other way not in conflict with the express provision of this Agreement."

Thus, the Management Rights Article gives the Company certain definite rights to exercise, so long as the exercise of those rights is "not in conflict with the provisions of this agreement." Moreover, the Company is not restricted in this exercise, even though not exercised for long periods of time, so long as its exercise is "not in conflict with the express provision of this Agreement." In addition, the Company argues that "there is absolutely no language, express or implied, contained in the Labor Agreement concerning a paid lunch period."

There are, however, express provisions contained in the Labor Agreement that cover payment for certain hours in excess of 8 in a day, or 40 in a week, or on Saturdays, Sundays, or Holidays (Article XI — Overtime and Premium Pay). The provisions of Article XI may be more important to this discussion, and the Grievances covered by this hearing, than the contentions of both parties concerning past practice, and its effect on the benefits of the employees, or the rights of Management under the Agreement.

The Company is correct in pointing out to this arbitrator that the provisions of Article VII (Grievance Procedures) of the Labor Agreement provide, in Section II, that "The Arbitrator shall have no power to add to or subtract from or modify any of the terms of this Agreement. . . ." This arbitrator is well aware of that mandate and prohibition, and believes in a strict construction of the Agreement itself, and all its provisions.

Whether or not the arbitral opinions of various arbitrators, concerning the force and effect of Past Practice, and whether or not such practices can, or do, become a part of the Labor Agreement under certain circumstances, cannot even be reached in this case, if the express provisions of the Agreement provide the resolution of this Grievance without discussions of the Past Practice issue.

Article XI of the Agreement governing this Grievance, and the interpretation of this Agreement to resolve the difference between the parties, may well cover the very issue, or issues, involved in all the Grievances that here have been combined to be heard as one Grievance herein.

Section I of Article XI provides that "Time and one-half *shall* be paid for the following (emphasis added):

"1) For all *time worked* in excess of forty (40) hours in any one week.

"2) For all *hours worked* on the holidays specified in this Agreement in addition to holiday pay if so entitled. (emphasis added)

"3) For all *time worked* during the twenty-four (24) hour period on Sunday. (emphasis added)

"4) For all *time* in excess of eight (8) hours in any one day. (emphasis added)

It is an axiom of industrial relations that all the words in a Labor Agreement have a meaning; they were placed there, or used, for some particular purpose.

In the provision for overtime in excess of 40 hours in one week, the requirement is for all "time worked." In the provision for overtime for holidays, the requirement is for all "hours worked" on such holidays. For overtime on Sundays, there is a requirement of all "time worked" during the 24-hour period on Sunday. However, for overtime in excess of 8 hours in any one day, the only requirement is for "all *time* in excess of" 8 hours in a day. (emphasis added)

In each of the first three provisions, the words, "time worked," or "hours worked," is a requirement for overtime pay. Only in the case of overtime worked in excess of 8 hours in one day is the provision for "time," and the word, "worked" is not included in

that provision. Therefore, in this one overtime provision alone, the hours in excess of 8 in one day are not hours that are required to be worked. Rather, any time in excess of 8 hours in one day, that the employee is required to be at the Employer's place of business, qualifies the employee for overtime pay. However, the Agreement specifically provides that hours shall not be pyramided for the purposes of payment of overtime pay. Nevertheless, the preamble to Section I of Article XI specifically provides that overtime "shall" be paid for "all time in excess of eight (8) hours in any one day."

The parties introduced into evidence Joint Exhibit 4 that appears to be a Memorandum from Management to the President of the IWA Local at Wright City. That Memorandum indicates that, before the scheduled change for a lunch break, the "typical maintenance employee" would work from 7:00 a.m. to 3:30 p.m. from Monday through Friday, and from 6:00 a.m. to 3:30 p.m. on Saturday. That is a period of 8-1/2 hours during the week days, and 9-1/2 hours on Saturday (with one week day off if the employee was to work on Saturday). The Memo indicates, further, that the employee would work and/or be paid for 8-1/2 hours for days assigned from Monday through Friday, and for 9-1/2 hours on Saturday.

The same Memorandum then shows how the pay schedule would be handled after the unpaid lunch period was scheduled. The hours on each shift continue to be the same; i.e., 8-1/2 hours per shift on Monday through Friday, and 9-1/2 hours on Saturday. However, the hours now being paid would be 8 per day on Monday through Friday and 9 on Saturday. This difference is due to the unpaid lunch period of 30 minutes daily.

The parties introduced Joint Exhibit 5 that covers the work schedules of "maintenance personnel assigned to plywood." (Joint Exhibit 4 covered all other maintenance personnel, plywood schedules being different). This schedule indicates that,

prior to March 28, 1989, maintenance employees in the plywood plant worked from 6:00 a.m. to 2:00 p.m. on Monday through Friday (with one scheduled day off), and worked from 6:00 a.m. to 3:30 p.m. on Saturday. These employees worked an 8-hour shift during the week-days, and a 9-1/2 hour shift on Saturday. The Exhibit indicates that they were paid for 8 hours for Monday through Friday, and for 9 hours on Saturday (however, they show to have worked for 9-1/2 hours on Saturday).

After the March 28, 1989 change in their work schedule, for the unpaid lunch period, the hours changed on Monday through Friday to: 6:00 a.m. to 2:30 p.m. (unchanged on Saturday). However, payment for these hours now was unchanged at 8 hours per day for week days, and at 9 hours for Saturdays worked. However, now the plywood maintenance employees were at the plant an extra one-half hour (8-1/2 hours) per day during the week, and the same 9-1/2 hours on Saturday.

According to Article XI of the Agreement, all "time in excess of eight (8) hours in any one day," should have been paid by the Company at the rate of 1-1/2 times the regular hourly rate of the individual employee. It appears from these two Joint Exhibits that such was not the case, and the "typical" maintenance employee worked the same number of hours as before: i.e., 8-1/2 hours (including lunch break), but after March 28, 1989, was paid only for 8 hours, in violation of Article XI of the Agreement. The maintenance employees in the plywood plant were required to work an additional 30 minutes during the week, for which they were paid nothing, and continued to work 9-1/2 hours on Saturday, but were paid only for 9 hours, again in violation of Article XI of the Agreement.

It is obvious to this arbitrator that the change made by the Company on March 28, 1989, was in direct contravention of, and conflict with, the express provisions of the Agreement. The employees who worked, and/or who were at the Employer's

place of business, and ready, willing and able to work, were not being paid in accordance with the overtime provisions of the Agreement (over 8 hours in a day).

The Company contends that there is nothing in the Labor Agreement, either express or implied, "concerning a paid lunch period." I cannot agree. Section I of Article XI expressly provides for overtime pay for those employees who have "time" at the plant, at the request of the Company, in excess of 8 hours in any one day. Those employees are not being paid in accordance with the express terms of the Agreement.

The Union alleged that the Company was in violation of the Labor Agreement for not so paying its employees overtime pay. The Grievances allege that the Company violated Article XI (overtime pay) "and all applicable" provisions of the Agreement. Ample proof was introduced in evidence to prove that the Company is not paying its Maintenance employees in accordance with Article XI of the Agreement.

The Company contends that this arbitrator is not bound by the prior award of Dr. A. Dale Allen. I agree. If the prior award of another arbitrator is "clearly erroneous," a subsequent arbitrator is not bound by the award of the previous arbitrator. I agree, also, that arbitration awards do not have the same doctrinal force — insofar as the doctrines of stare decisis and res judicata are concerned — as have the judicial decisions in appellate judicial forums.

In proof of this argument, the Company quotes from a maxim set forth by former Supreme Court Justice William O. Douglas, stated as follows: "An arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice." I agree completely with this maxim. However, my opinion and award do not follow that of Professor Allen in the case submitted as Joint Exhibit 6, as his award seems to be based almost, if not,

entirely on the argument of Past Practice, and it becoming an integral part of the Labor Agreement, under certain circumstances. My own opinion and award are not concerned with the issue of Past Practice. Rather, they draw their essence directly from a specific provision of the Agreement itself; one that has been negotiated and agreed upon by both parties to the said Agreement, and one that is binding upon both such parties.

The Company relies heavily on Section III of Article II (Management's Rights Clause) of the Labor Agreement. The Company cites that part of the Agreement that provides that the Company is not precluded from exercising any function reserved to it in the Agreement "in some other way not in conflict with the express provisions of this agreement." However, as I have shown above, the Company did exercise this function (of scheduling an unpaid lunch period during the Maintenance employee's regularly-scheduled shift.) If the Company keeps the employee at the plant for more than 8 hours in any one day period, then it must pay that employee for all hours over 8 at the overtime rate. It has not done so.

The Company then cites from the Elkouri book, HOW ARBITRATION WORKS, as follows:

> "Ordinarily all words used in an agreement should be given effect. The fact that a word is used indicates that the parties intended it to have some meaning, and it will not be declared surplusage if a reasonable meaning can be given to its consistent with the rest of the agreement."

This arbitrator follows this reasoning by the Elkouris, and has given each word in Section II of Article XI the meaning that appears to be that intended by the parties. If a certain word is used by the parties in their Agreement, then, certainly, the omission of a certain word — in the context of the other words so used — must have some meaning as well. Since the parties chose to use the words, "time worked," or "hours worked," in three of the four

provisions of Section II of Article XI, then there must have been some valid, logical reason that the parties chose to drop the word "worked" from the fourth such provision. In any event, they negotiated the wording of that said Section, and that cannot be ignored.

Since the thrust of the Company's Brief, filed in this matter, seems to be that of discounting the Allen Award; of showing that it was not a correct award; that it did not draw its essence from the Agreement; and that it was made without benefit of some important and relevant facts and considerations, I will spend no more time in an effort to distinguish this opinion and award from that of Dr. Allen. Suffice it to say, we have approached the issue of scheduled unpaid lunch periods from an entirely different point of view. Therefore, I am not concerned with the validity of Dr. Allen's finding of fact, his conclusions, or of his award. My own award must stand on its own merits, based upon my reasoning as expressed herein.

The Grievances request the payment of all hours after March 28, 1989, for which the Company refused to pay due to the scheduling of unpaid lunch periods to the covered Grievants. I have found these Grievants are entitled to such back pay award. However, the Grievants also request this arbitrator to grant them interest on their back pay award. Interest on back pay awards usually is granted, if and when it is so granted, as a form of punishment. Such punishment is meted out in the event the arbitrator finds the Company, in this instance, to have acted arbitrarily, capriciously or maliciously. This arbitrator cannot find that the Company here has been guilty of any of those transgressions. Rather, I find that the Company is honest and earnest in its belief that its interpretation of the Agreement is the correct interpretation. The Company sincerely believes that Dr. Allen's award was incorrect and wrong. However, just because the Company failed to note the difference in the overtime provisions of Section I of Article XI does not prove that the

Company acted in complete disregard of the rights and privileges of the Grievants, or in disregard of its obligations under the Agreement. The Company merely has a different interpretation of the Labor Agreement than does this arbitrator, as applies to the issue in question. No interest will be awarded.

AWARD OF THE ARBITRATOR

The Issue: DID THE COMPANY VIOLATE THE COLLECTIVE BARGAINING AGREEMENT ON AND AFTER MARCH 28, 1989, WHEN IT CEASED PAYING LUNCH PERIODS FOR THOSE MAINTENANCE EMPLOYEES WHO HAD BEEN RECEIVING SUCH PAYMENTS PRIOR TO THAT DATE? IF SO, WHAT SHALL BE THE APPROPRIATE REMEDY THEREFOR? is answered in the affirmative. The Company did so violate section I of Article XI of the Agreement. The Grievance, therefore, is sustained and the Company is directed to pay the affected employees their back pay for all time in excess of 8 hours in any day, Monday through Saturday, that each Grievant herein was scheduled to work on and after March 28, 1989, but no interest shall be due or payable thereon.

/s/ Barnett Goodstein
Barnett M. Goodstein
Arbitrator

4230 LBJ Freeway, Suite 121
Dallas, Texas 75244
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July 24, 1991

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 92-3709WAHS

International Woodworkers of America,
U.S., AFL-CIO;
Local 5-15 International Woodworkers of America,
U.S., AFL-CIO,
Plaintiffs-Appellees,

vs.

Weyerhaeuser Company,
Defendant-Appellant.

Order Denying Petition for Rehearing and
Suggestion for Rehearing En Banc

The suggestion for rehearing en banc is denied. Chief Justice Arnold, Judge McMillian, and Judge Morris Sheppard Arnold would grant the suggestion for rehearing en banc.

The petition for rehearing by the panel is also denied.

Judge John R. Gibson took no part in the consideration or decision of this case.

January 11, 1994

Order Entered at the Direction of the Court:
/s/ Michael E. Gans
Clerk, U.S. Court of Appeals, Eighth Circuit